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IN THE

Supreme Court of the United States

[illegible] Term, 1971

No. 1327

[illegible] PETITIONER

vs.

PENNSALT CHEMICALS CORPORATION RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

_____ Term, 1971

No. _____

JESSE R. GIBS PETITIONER

vs.

PENNSALT CHEMICALS CORPORATION RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Jesse R. Gibs, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on September 30, 1970.

OPINIONS BELOW

The opinion and order of the District Court is unreported and is printed in Appendix A hereto.

The opinion of the Sixth Circuit Court of Appeals is reported at 433 F2d 1020 and is printed in Appendix B hereto. The order denying the petition for a re-hearing with the suggestion for a re-hearing en banc is unreported and is printed in Appendix C hereto.

JURISDICTION

The United States District Court for the Western District of Kentucky entered judgment on a directed verdict for the respondent in this diversity action (Appendix A). Petitioner's appeal to the Sixth Circuit Court of Appeals was denied on September 30, 1970 (Appendix B). Petitioner's due and timely petition for re-hearing was denied on November 10, 1970 (Appendix C). The jurisdiction of this Court is invoked under 28 USC., § 1254 (1).

QUESTIONS PRESENTED

Whether this court will protect the right of trial by jury of a human being condemned to a life of cruel and inhuman punishment even though in a civil action.

Otherwise put:

a. Can a Federal Court in a diversity action deny a party trial by jury by directing a verdict for the adverse party when there exists questions of fact, material to the issue, under the applicable state law?

b. Can a Federal Court in a diversity action deny a party trial by jury by directing a verdict for the adverse party when under the federal test the sufficiency of evidence is such as to create a jury question?

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are Amendment VII to the Constitution of the United States of America and §. 7 to the Bill of Rights, The Constitution of Kentucky (1891). The foregoing are printed in Appendix D.

STATEMENT

I. The Facts.

Petitioner Jesse Olds has been condemned to a life of cruel and inhuman punishment by reason of the negligence

of the defendant in failing to see that a cover was placed over or a barricade placed around a pit in the floor where he was working. Since the pit was filled with standing water from steam not vented as safe practice required, petitioner was scalded from his waist down. As stated by the neurosurgeon, his "switchboard" in his brain is jammed open and he suffers exquisite pain all the time.

3. The Situation Leading to the Denial of the Petitioner's Right to Trial by Jury.

The courts below, entranced by arbitrary labels such as "independent contractor," refused to submit the question as to whether petitioner's employer ("Pip" Johnson Construction Company) was an independent contractor to the jury and ignored the vast control retained by the defendant over the corporation even to the control of safety standards and the absolute right without penalty to discharge the "Pip" Johnson Construction Company at any time simply by handing "Pip" Johnson a note to this effect.

4. Proceedings Below.

This action was instituted in the United States District Court for the Western District of Kentucky, at Paducah, Kentucky on January 31, 1968. Jurisdiction is in the District Court because of diversity of citizenship of the parties, 28 U.S.C., § 1332 (a). Trial was before a jury on May 22, 1969 and May 23, 1969. The trial court directed a verdict on the grounds that "Pip" Johnson was an independent contractor who insulated the defendant. The judgment was affirmed by the Court of Appeals for the Sixth Circuit on September 30, 1970. A petition for re-hearing was denied by that court by its order of November 10, 1970. The court's judgment was issued on November 19, 1970.

4. Reasons For Granting The Writ.

This court has gone to great lengths to protect the rights and preserve the right to jury trial of individuals charged with crime or individuals suffering imprisonment. Jesse Olds, the petitioner here, is imprisoned for life in a Hell that this court would condemn as cruel and inhuman imprisonment and he has been effectively denied the right to trial by jury. By an arbitrary label called "independent contractor" a large corporation has been permitted to injure with impunity this citizen and then the courts have denied him the constitutional right to trial by jury.

More galling than the simple denial of the trial by jury is the fact that the actual law of the case cries out that a case of this kind be submitted to a jury and this applies whether the court follows the doctrine in Erie R. Co. v. Tompkins, 58 S Ct. 817, 304 US 64, 82 L Ed 1188, to reach back to the Kentucky law or follows federal procedure.

The petitioner argues here as he has at every stage of this proceeding, that "Pip" Johnson Company was not an independent contractor, but that this company was in every way a "dependent" contractor.

The contract itself readily shows that the respondent had the right to control the very manner of doing the work, including the qualification and type of employees (p. 27a), the safety measures (p. 33a) and the power to see that the safety laws and regulations were complied with (p. 97a). The respondent's construction engineer, Carnahan, testified that it was his duty to see that the provisions of the contract were carried out (p. 71a), that he and other persons in his stead were present at all times during the contract and that he had authority to enforce the safety laws and regulations (p. 97a). In addition, there was substantive testimony that Carnahan did order changes or corrections made for what he considered

unsafe or unsatisfactory conditions (p. 117a and 118a). References in this paragraph are to appendix filed with Sixth Circuit Court of Appeals and part of this record.

Lastly, the trial court relied on Simmons v. Clark Construction Company, Ky. (1968) 426 S.W. 2d 930, but Simmons is distinguishable since in that case it was agreed that the owner did not have the right or duty to direct how the work was to be done. In stating that the retention of the right to terminate the contract without cause gives the respondent control over "Pip" Johnson and shows that the latter was not an independent contractor, the petitioner is not demanding any unusual application of the law. See Nordling v. Johnston, 283 P. 2d 420 where the court held that:

> "No fact is more conclusive of the existence of the employer's right to interfere with the manner and method of accomplishing the result than the unrestricted right of the employer to end the particular service whenever he chooses without regard to the final result of the work itself."

See also:

> "The power of an employer to terminate a contract or discharge the person employed at any time, irrespective of whether there is or is not a good cause for so doing, is indisputably an evidential element which tends strongly to show that the person employed is not an independent contractor but a servant." 41 Am. Jur. 2d, Independent Contractor § 19, P. 768.

More importantly we turn to what the Kentucky Court of Appeals says on this subject. In Coleman v. Baker, Ky. 382 S.W. 2d 843 (1964), the plaintiff's suit for damages was based on the theory that the premises and operations where the accident occurred were under the management and con-

trol of the defendant and that the accident causing plaintiff's injury resulted from the negligence of the defendant's employees. The defendant claimed that the tortfeasor was an independent contractor and introduced a contract showing this relationship between the defendant and the tortfeasor. The trial court held that an independent contractor relationship existed as a matter of law. The Court of Appeals of Kentucky reversed, holding that:

> "Under this evidence we are unable to say that the written contract introduced in evidence reflected the actual arrangement between Baker and the workmen or, if so, that it was conclusive of the question whether they were servants or independent contractors. The building was owned by Baker and the business was conducted under the name of Baker Electric Company. Until very shortly before the accident, unquestionably it was operated on a master-servant basis. That the method of payment was changed from salary to job rate (if, indeed, it was really changed) is not of dispositive significance. The ultimate test is the control reserved or exercised by the employer, and even if there is a written contract, actual practice under it may out-weigh its provisions. Cf. 53 A.L.R. 2d 183, 185. If different inferences may reasonably be drawn with respect to the true relationship of the parties, a jury question is presented. 1 Restatement of Agency 2d § 220, comment e.; 56 C.J.S. Master and Servant § 13, p. 92; 35 Am. Jur. 1040 (Master and Servant, § 600). (P. 845) (Emphasis ours)

In Brown v. Gradison Construction Company, Ky. 32 S.W. 2d 1014 (1930) the Kentucky Court of Appeals was confronted with a case involving an accident arising from the use of a truck owned by one James Richards, driven by his son Owen Richards and hired to the defendant Gradison Construction Company upon these terms:

> "Richards furnished his truck and the driver, oil, gasoline, and everything else necessary for its operation; and the Gradison Construction Company paid him $2.50 an hour for its use. Richards hired and paid this driver, and Gradison Construction Company had no right under the contract to discharge him or to put upon this truck a driver of their selection, but they had the right to send the truck home and terminate this contract when they chose. The Gradison Construction Company directed the hauling, unloading, and operation of this truck." (p. 1015)

The trial court held in substance that James Richards was an independent contractor. The Court of Appeals reversed:

> "By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. Franklin Coal & Coke Co. v. Ind. Com., 286 Ill. 329, 129 N.E. 811." (p. 1017) (Emphasis ours).

It is the Seventh Amendment to the Constitution of the United States that guarantees the parties right to trial by jury in civil actions. The court in directing a verdict for the respondent here, not only failed to follow "Erie" in applying the substantive law of the Commonwealth of Kentucky but at the same time deprived the plaintiff of his federal and state constitutional right of trial by jury.

It might be noted that the Constitution of Kentucky as well as the Constitution of the United States jealously preserves the right of trial by jury.

> "Trial by jury inviolate. —The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." (The Bill of Rights, The Constitution of Kentucky (1891) § 7).

If this court is of the opinion that petitioner's right to trial by jury is procedural as stated by some of the Federal Circuit Courts then under the federal standards certainly petitioner is entitled to a trial by jury.

While the Sixth Circuit has not yet found it necessary to choose between the state and federal test, the question was discussed at length in Ewing Company v. Shipstine, 411 F. 2d 365 (1969) (Fifth Circuit). The federal standard has been set forth in the Supreme Court's decision in Lavender v. Kurn, 327 U.S. 645-654, 66 S.Ct. 740, 90 L Ed 916 (1946) where the court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." (327 U.S. at 653, 66 S.Ct. at 744, 90 L Ed at 923).

Lavender is a FELA case and therefore a statutory cause of action. It was the Supreme Court, however, that spelled out the test for the sufficiency of the evidence to create the jury question and not the statutory language. The Seventh Amendment's right of trial by jury should not depend upon the type of the action or the circuit in which the action is brought.

In Bielk v. New York Life Insurance Company, 79 S.Ct. 921, 359 US 437, 3 L Ed 2d 935 this court held that the question whether it was proper to apply the state or federal test of sufficiency of the evidence in a diversity action was not

properly before it in view of the fact that both parties in their briefs and arguments before the Supreme Court assumed that the state standard applied. Here the question is raised.

Olds reiterates that the most important evidentiary fact determining the independent contractor relationship (as determined by the state law) was in evidence and that under "Erie" the District Court was bound to let Olds go to the jury as to whether the independent contractor relationship existed between "Pig" Johnson and respondent. Secondly, Olds contends that even if he were not entitled to go to the jury under the state test for the sufficiency of evidence in this diversity action (and plainly he was) then he was entitled to go to the jury under the federal test for the sufficiency of evidence and this issue can and should be determined now.

These issues should be considered by this Court because of the general importance of determining, at last, the extent of the right afforded under the Seventh Amendment of trial by jury in common-law actions, the further importance of resolving the conflict between the Circuits (See footnote 2, page 368 Boeing Company v. Shipman, supra) on this fundamental question and further direction from this Court as to whether "Erie" is to be followed in the determination of the right to trial by jury.

It is the contention of the petitioner that an injured workman, regardless of where he works, whether on a railroad and covered by FELA, or any place, is entitled to the same right to trial by jury and, that this right is as important to an injured workman, as it is to a person accused of a crime. Imprisonment can be effected as certainly with the terrible onslaught of constant pain as it can by iron bars.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel

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CERTIFICATE OF SERVICE

I, Charles A. Williams, counsel for Jesse R. Olds, in the matter styled "Jesse R. Olds v. Pennsalt Chemicals Corporation," do hereby certify that I served a true copy of the foregoing petition (with Appendix) for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on February 1, 1971, by depositing same in a United States mailbox, with first class air mail postage prepaid, addressed to Thomas Marshall, Jr., Wheeler & Marshall, Attorneys at Law, Citizens Bank Building, Paducah, Kentucky 42001, counsel of record for the respondent.

Charles A. Williams